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No. 75-1612

In The

Supreme Court of the United States

October Term, 1975

ETHYL CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER, ETHYL CORPORATION

Of Counsel:

FREDERICK P. WARNE
Ethyl Corporation
330 South Fourth Street
Richmond, Virginia 23219
General Counsel

JOSEPH C. CARTER, JR.
DAVID F. PETERS
HUNTON & WILLIAMS
700 E. Main Street
Richmond, Virginia 23212

JOHN J. ADAMS
HUNTON & WILLIAMS
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006
Counsel for Petitioner

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In its brief in opposition to the petition for a writ of certiorari, Respondent characterizes these cases as a factual dispute only, with no disagreement of consequence among the judges of the court below that would be worthy of the Court's review. This surprising characterization is a complete reversal of Respondent's position in the court below that the issues involved were so important as to require an *en banc* hearing, and that, unless reversed, the decision of the initial panel would make impossible any further rulemaking in the area of environmental health. EPA Petition for Rehearing and Suggestion for Rehearing En Banc at 3; Supplemental Brief for Respondent at 6-7. Respondent's Brief misinterprets the five separate opinions of the majority and minority below and improperly belittles the sig-

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nificance of the issues involved. This Reply Brief is required to answer specifically these inaccuracies.

ARGUMENT

Significance of Decision Below

The decision below upholding Repondent's regulations requiring for public health reasons the phased reduction of lead antiknocks used in motor gasoline illustrates clearly the need for this Court to define the scope of judicial review of complex environmental regulations of great economic and social impact where the agency admittedly acted on the basis of incomplete data and predictions of future harm.

The fact that the decision came from the "bellwether circuit for administrative law questions,"[1] the closely divided vote, the differences within the majority as to scope of review, and the depth of disagreement between majority and minority all underscore the importance of this case.

The specific questions at issue were (1) Respondent's statutory authority for regulatory action, (2) the scope and method of judicial review under the "arbitrary and capricious standard" of future-oriented environmental controls, and (3) the procedural propriety under due process standards of the manner in which the agency promulgated and justified its regulations. The Respondent's brief notwithstanding, the majority and minority of the court below were totally at odds over all these questions.

1.

Statutory Authority

As to the statutory standard, the majority approved Respondent's interpretation that "will endanger" means the

[1] Thompson, *The Role of the Courts*, in Federal Environmental Law 192, 211 (1974).

same as "substantial risk of harm." In so doing the majority reasoned that the statute is precautionary and authorizes regulation without evidence of actual cause and effect, thus empowering Respondent to make "quasi-legislative policy judgments" and to assess risks of future harm. In developing this novel theory of total deference to administrative expertise in the field of environmental regulation, Judge Wright has gone directly contrary to the established procedure of most scientists and judges to make decisions and predictions on the basis of completed data demonstrating a highly probable chain of causation.

Respondent's intimation that the dissenting judges ultimately agreed with the agency's interpretation of the statutory standard (EPA Brief at 12) is totally misleading. While acknowledging that a finding of "significant risk of harm," *if properly interpreted*, could satisfy the "will endanger" standard of Section 211, Judge Wilkey's opinion entirely rejected the view that the statute conferred the power to make quasi-legislative policy judgments. Comparing the unique language of Section 211 to the other operative sections of the Clean Air Act, the dissent concluded that the statute does not permit regulatory action based on speculation as to risks and a nonexistent data base.

In short, the majority below has endorsed Respondent's contention that it has the broadest regulatory power over all areas of our national life—power that can be exercised without any objective standards and without fear of reversal by the judiciary. The minority below has insisted, on the other hand, that until Congress speaks much more clearly than it has done so far, Respondent must meet a definite statutory standard that requires a clear evidentiary base for regulatory action and that necessitates the application by the courts of the traditional rules of judicial review. Only this Court should decide which of these widely divergent views will prevail in the future.

2.

SCOPE OF JUDICIAL REVIEW

In an effort to minimize the legal issues that diametrically split the court below, Respondent suggests that at least seven of the nine judges of the Court of Appeals are in "unqualified agreement" as to the reviewing court's responsibility on judicial review. EPA Brief at 21. As a review of the opinions demonstrates, however, the Wright and Wilkey opinions agreed only that the "arbitrary and capricious" standard of review should control. As to what the respective judges consider the "arbitrary and capricious" standard to mean, however, there are vast differences. In the case of Judges Wright, Robinson and Leventhal, the evidence must be reviewed, but only for the purpose of determining whether it reflects a "minimum rationality." Judges Bazelon and McGowan expressed the view that the court must affirm on the basis of procedural regularity alone, without regard to substantive rationality at all. The dissenting judges, on the other hand, would apply the standard set by this Court to the methodology employed by the agency in reviewing the evidence and in formulating its conclusions, recognizing that an agency's approach to a problem is often the best test of the arbitrariness of the action.[2]

Respondent's suggestion that Judges Bazelon and McGowan may have actually reviewed the record evidence with as much detail as the other judges (EPA Brief at 20-21) belies the language of their opinion and ignores their

[2] "[T]hough an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284-85 (1974). The reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

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basic approach. The problem with the majority's suggested standard of review (whether it be Judge Wright's or Chief Judge Bazelon's) is that it immunizes the regulatory agency from any substantive judicial review; a result totally at odds with the "clear error of judgment" test prescribed by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), a decision Judge Wright finds "difficult to plumb." Maj. op. at 70 n. 74.

Rather than evidencing unqualified agreement, as Respondent suggests, the widely divergent opinions and conflicting philosophies of the judges below reveal fundamental differences as to the meaning of the "arbitrary and capricious" standard of review. Until these differences are resolved by this Court, the determination of the legality of administrative action in a given case will be largely dependent upon the particular panel of the court assigned to review the matter.

3.

PROCEDURAL REQUIREMENTS

The final, and possibly the sharpest, dispute between the majority and minority below involved the contention that Respondent had not accorded the required administrative due process because the final regulations were promulgated without giving Petitioners or other interested parties the opportunity for meaningful comment on new supporting evidence.

In its Brief in Opposition, Respondent grossly distorts this dispute by again claiming it was merely a factual disagreement. Actually the dispute goes to the heart of settled doctrines of administrative due process. Judges Wright, Robinson and Leventhal brushed aside virtually all these doctrines in their rush to uphold the regulations under attack.

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Yet the remaining six judges criticized procedural irregularities indulged in by Respondent. Judges Bazelon and McGowan criticized Respondent's procedures, saying they would ordinarily require a remand for clarification, but ended up by concurring with the majority. The remaining four judges agreed strongly that Respondent had not complied with administrative due process, and that the regulations must be remanded or set aside on procedural grounds.

It is particularly important for this Court to resolve this bitterly disputed question and to put the administrative agencies clearly on notice that the basic rules of administrative fairness have not changed.

CONCLUSION

For the reasons set forth herein and in the Petition, a writ of certiorari should be issued in this case to review an entirely new approach to judicial review of environmental cases formulated and applied by a majority of the court which (except for this Court) is most influential in shaping administrative law in this country.

Respectfully submitted,

JOSEPH C. CARTER, JR.
DAVID F. PETERS
HUNTON & WILLIAMS
700 E. Main Street
Richmond, Virginia 23212

JOHN J. ADAMS
HUNTON & WILLIAMS
1730 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Counsel for Petitioner

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